SUPREME COURT, U. S.

DEC 14 1973

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. 73-928

SAMUEL NORMAN ROEDER,
husband and EDITH ROEDER,
wife
Petitioners

v.

GENERAL MOTORS CORPORATION
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	3
Argument	
In a diversity action, under Pennsylvania law, based on Section 402 A of the Restatement of Torts, 2d, it was error for the trial court to instruct the jury on contributory negligence without also charging that the defendant had the burden of proof on that issue	7
Conclusion	12
Appendix	13

List of Citations

Brown v. Jones, 404 Pa. 513, 172 A.2d (1961)	9

Page

Ferraro v. Ford Motor Co., 423 Pa. 324, 223 A.2d 746 (1966) 8

Grochowski v. Ardes, 402 Pa. 614, 168 A.ed 327 (1961)..... 12

Henrich v. Cutler Hammer Co., 460 F.2d 1325 (3d Cir. 1972) 10

Sarne v. Baltimore & Ohio R. Co., 370 Pa. 82, 87 A.2d 264 (1952)..... 9

Sullivan v. County of Allegheny, 187 Pa. Super, 370, 144 A.2d 498 (1958)..... 9

Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966)..... 8

MISCELLANEOUS

Restatement of Torts, 2d, Section 402 A..... 2

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. 71-1769

SAMUEL NORMAN ROEDER,
husband and EDITH ROEDER,
wife
Petitioners

v.

GENERAL MOTORS CORPORATION
Respondent

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinions and orders of the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit have not been reported. A copy of these opinions appears in the Appendix.

JURISDICTION

Jurisdiction in this Court is based on 28 U.S.C.A. Section 1254. The United States District Court for the Eastern District of Pennsylvania entered judgment on the jury verdict for defendant and denied plaintiffs' motion for judgment N.O.V. or, in the alternative, for a new trial on June 30, 1971. The United States Court of Appeals for the Third Circuit affirmed in a per curiam decision on September 7, 1973. A rehearing was denied en banc on October 5, 1973.

QUESTION PRESENTED

Whether it was error for the trial court, in a diversity action, under Pennsylvania law, based on Section 402A of the Restatement of Torts, 2d, to instruct the jury on contributory

negligence without also charging that the defendant had the burden of proof on that issue.

STATEMENT OF THE CASE

This is a products liability diversity action based upon defendant's strict liability in tort for selling plaintiff a Corvair whose right rear wheel collapsed, causing plaintiff severe injuries.[1]

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1. Roeder was thrown out of the car and then the car rolled on his chest, in a crushing blow fracturing his sternum and skull. Roeder's right ear was amputated. He is now cross-eyed in both eyes. He also has double vision when both eyes are open, and therefore, he wears a patch over one eye at all times. He has poor depth perception. His taste and hearing are both severely impaired bilaterally. He has facial weakness bilaterally. Five doctors testified for plaintiff. The defense called no medical witnesses. Roeder, a former Little All American fullback at Franklin and Marshall, was in excellent health prior to the accident. He is presently a grotesque figure.

On October 29, 1965, plaintiff, SAMUEL NORMAN ROEDER, (hereafter Roeder), bought a brand new 1965 Corvair from the Palmerton Motor Corporation (N.T. 300). Sixteen days later on November 14, 1965, at 12:30 a.m. Roeder was driving east on Towamensing Road in Palmerton, Pennsylvania. The roadway was slightly downgrade and dry (N.T. 9, 334). Towamensing Road runs east and west (N.T. 10).[2] It is a two land macadam highway, 22 feet wide with a 2-3 foot shoulder which was below the macadam about one-half inch to one inch (N.T. 10). The road and shoulder were in new condition. (N.T. 303).

Roeder had traveled the road thousands

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2. Towamensing Road, which runs east and west is intersected by Sand Quarry Road which runs north and deadends at Towamensing. At this point on the north side of Towamensing Road, there is a shale quarry.

of times back and forth from home to work. (N.T. 304).

Just prior to the collapse of the wheel, Roeder had been traveling about 20 to 25 miles per hour (N.T. 306). Then as he came out of a slight lefthand curve in the road, the right rear of the Corvair pulled slightly to the right. Roeder tried to keep his car going straight but he could not prevent both front and rear right tires from going on the shoulder (N.T. 306). Roeder then saw a telephone pole directly ahead and turned his car at a 30 degree angle back onto the road, when there was a thump in the right rear and the right rear dropped (N.T. 307, 308, 337, 338). Roeder tried to stop his car but the pedal went to the floor (N.T. 338). Going at only 15 miles per hour, Roeder steered the Corvair across Towamensing Road towards a shale quarry area a few feet north of the road

(N.T. 338). Roeder heard a metallic sound as his car went across the road (N.T. 309). The Corvair went up a sand embankment two to three feet high which embankment sloped down toward the right (N.T. 145). The Corvair then turned over on its right side throwing Roeder from the car and rolling over him. (N.T. 309).

Plaintiff's expert witness testified that the accident was caused by a collapse of the right rear suspension system (N.T. 306). Over the objections of plaintiff (N.T. 558, 567), the Court charged the jury on a contributory negligence theory denominated by the defendant as "driver error" (N.T. 601, 606). The District Court did not instruct the jury that the defendant had the burden of proving contributory negligence.

The jury returned a general verdict

for the defendant. Plaintiff's motions for judgment notwithstanding the verdict and a new trial were denied. This was affirmed in a summary opinion by the Third Circuit. Plaintiff now seeks a writ of certiorari.

ARGUMENT

IN A DIVERSITY ACTION, UNDER PENNSYLVANIA LAW, BASED ON §402 A OF THE RESTATEMENT OF TORTS, 2d, IT WAS ERROR FOR THE COURT TO INSTRUCT THE JURY ON CONTRIBUTORY NEGLIGENCE WITHOUT ALSO CHARGING THAT THE DEFENDANT HAD THE BURDEN OF PROOF ON THAT ISSUE

In submitting the defendant's theory of "driver error" in the manner it did, the trial court instructed the jury contrary to existing Pennsylvania law. Section 402 A of the Restatement was adopted as Pennsylvania law on the subject of strict liability in the

case of Webb v. Zern, 422 Pa. 324, 223 A.2d 746 (1966). This was further amplified in Ferraro v. Ford Motor Co., 423 Pa. 324, 223 A.2d 746 (1966) where contributory negligence in the sense of voluntary assumption of the risk, as set forth in comment"n" to Section 402 A of the Restatement[3] was adopted as law. This, of course, is an affirmative defense requiring the defendant to sustain the burden by a preponderance of the evidence.

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3. This provision states in part:

". . . the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."

In negligence actions, the Supreme Court of Pennsylvania has held that the trial judge must instruct the jury that the defendant has the burden of proving contributory negligence and voluntary assumption of risk. Brown v. Jones, 404 Pa. 513, 172 A.2d 831 (1961); Sarne v. Baltimore & Ohio R. Co., 370 Pa. 82, 87 A.2d 264 (1952). In Brown, a jury verdict for the defendant was reversed because the trial judge failed to give the proper instruction on where the burden lies on the issue of contributory negligence. In fact, the duty of the trial judge is so exacting that a misleading instruction is sufficient cause to require a new trial. Sullivan v. County of Allegheny, 187 Pa. Super, 370, 144 A.2d 498 (1958).

This principle holds true not merely in negligence actions, but any time the affirma-

tive defenses of contributory negligence or voluntary assumption of the risk are raised. In fact, the court below, using Pennsylvania law in another Section 402 A case, has held that this burden is on the defendant and that the judge must so charge. Henrich v. Cutler Hammer Co., 460 F.2d 1325 (3d Cir. 1972).

In the case at bar, the defendant used the theory of driver error as a cloak for contributory negligence. When the court instructed the jury on that theory and failed to include a charge that the burden of proof was on the defendant, it committed prejudicial error requiring a new trial.

A close look at the testimony and the court's charge bears this out. Defendant's expert, Mr. Conklin, on direct examination in response to hypothetical question, stated that the cause of the accident, in his opinion, was "driver error" (N.T. 410-415).

The Court charged the jury on driver error, on two occasions, as follows:

> The defendant contends that there was no defect in this automobile and that the accident was caused by driver error. (N.T. 601).

Again, the jury was instructed to consider driver error

> . . . in determining whether or not the plaintiffs have met their burden of proof by a preponderance of the evidence first that there was a defect in the car when it was sold and that the defect created an unreasonable risk of danger and that it proximately caused the accident. (N.T. 606).

In failing to charge the defendant had the burden of proof on this issue, the Court radically departed from existing Pennsylvania law and committed prejudicial error. As a result, the Court should have granted plaintiff's

motion for a new trial. Grochowski v. Ardes, 402 Pa. 614, 168 A.2d 327 (1961).

CONCLUSION

For the reasons stated herein, plaintiff prays this Court to grant the Petition for a writ of certiorari.

Respectfully Submitted,

MONHEIT AND ROSENFIELD

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UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAMUEL NORMAN ROEDER, husband and EDITH ROEDER, wife, Plaintiffs,	:	No. 10240 Civil
v.	:	
GENERAL MOTORS CORPORATION, Defendant.	:	

ORDER

This cause came on to be heard on motion of the plaintiffs, Samuel Norman Roeder and Edith Roeder, to set aside the verdict of the jury in favor of the defendant, General Motors Corporation, and to enter judgment in favor of the plaintiffs in accordance with the motion for a directed verdict made by the plaintiffs at the close of all the evidence, and in the alternative for a new trial, and the court having heard the arguments of counsel, and being fully advised,

It is ORDERED that the motion be and the same hereby is denied.

/s/ Michael H. Sheridan

Chief Judge
Middle District of Pennsylvania

Dated: June 30, 1971.

FILED
JUN 30 1971
T. H. CAMPBELL, Clerk

UNITED STATES COURT OF APPEALS
For The Third Circuit

NO. 71-1769

SAMUEL NORMAN ROEDER, husband
and EDITH ROEDER, wife,

Appellants,

v.

GENERAL MOTORS CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6) September 7, 1973
Before STALEY, HASTIE and GIBBONS, Circuit Judges

J U D G M E N T O R D E R

Appellant contends (1) that the district court should have granted judgment for plaintiff n.o.v., (2) or alternatively should have granted a new trial. The evidence sustains the verdict. Appellant contends that the court erred in submitting to the jury defendant's theory that driver error was the proximate cause of the accident. We find no error.

It is therefore O R D E R E D and A D J U D G E D that the judgment of the district court is affirmed. Costs to appellee.

By the Court,

JOHN J. GIBBONS
Circuit Judge

Attest:
Thomas F. Quinn
Clerk

Dated: September 7, 1973

SUPREME COURT, U. S.
DEC 31
MICHAEL RODAK, JR.

In the Supreme Court of the United States

October Term, 1973

No. 73-928

SAMUEL NORMAN ROEDER. Husband and EDITH ROEDER, Wife,

Petitioners

vs.

GENERAL MOTORS CORPORATION,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Counter-Statement of Questions Presented	1
Counter-Statement of the Case	2
Argument:	
(1) Driver error was for the jury on the issue of causation	6
(2) At the pre-trial conference it was understood and agreed that driver error would be an issue at the trial	7
(3) Even if the charge were improper, a new trial could not have been granted because Plaintiff failed to comply with Rule 51	10
(4) Conclusion	16

TABLE OF CITATIONS

CASES:

Arnold v. Loose, 352 F. 2d 959 (3rd Cir. 1965), pages 963-964 13

Dyson v. General Motors Corporation, 298 F. Supp. 1064 (E.D. Pa. 1969), page 1074 7

Frankel v. Burke's Excavating, Inc., 397 F. 2d 167 (3rd Cir. 1968), page 170 13

Harkins v. Ford Motor Company, 437 F. 2d 276 (3rd Cir. 1970), page 278 13

Kolman v. Jacoby, 419 F. 2d 395 (3rd Cir. 1969), page 395 14

Shaw v. Lauritzen, 428 F. 2d 247 (3rd Cir. 1970) 14
White v. Rosenberry, 441 Pa. 34 7

MISCELLANEOUS:

Federal Civil Procedure Rules:
Rule 19 16
Rule 51 .....10, 12, 16
Restatement of Torts, Section 402a 8
Wright and Miller Federal Practice and Procedure, Volume 9, page 623 15

COUNTER-STATEMENT OF QUESTIONS PRESENTED

(1) Where an action is tried under Section 402 (a) of the Restatement of Torts and the question for the jury is whether the accident was caused by a defect in the vehicle or by excessive speed or the manner of operation or conditions under which the vehicle was being operated, is it error to submit to the jury the question of driver error?

(2) Did the Plaintiff comply with Rule 51?

COUNTER-STATEMENT OF THE CASE

The vehicle involved was sold by the Defendant to a retailer, Iffert Company, several months before the accident. Said retailer sold the vehicle to another retailer, Palmerton Motors, and the latter sold the vehicle as a new vehicle to the Plaintiff on October 29, 1965 (Appendix 43a and N.T. 511, 512). The accident occurred November 14, 1965. The action was instituted November 10, 1967, or four days before the end of the Statute of Limitations. The action was instituted against the Defendant only. Neither retailer was included as a Defendant. The case was tried entirely on the theory of strict liability or under Section 402A of the *Restatement of Torts.* The Plaintiff admitted there was no defect in the design of the vehicle (Appendix 19a). The Plaintiff relied entirely upon alleged defective manufacture or assembly of the right rear wheel of the vehicle (Appendix 19a). The jury returned a verdict for the Defendant.

The first notice the Defendant received of the accident was when the Defendant was served with a copy of the complaint more than two years after the date of the accident (Appendix 70a). In the meantime the vehicle was scrapped. Therefore, the Defendant never had an opportunity to examine the vehicle or any part thereof. Although the Plaintiff knew where the vehicle was located for several months after the accident and although the Plaintiff's son examined the vehicle after the accident (N.T. 147), the only expert the Plaintiff called at the

trial, Mr. Pruyn, did not have an opportunity to examine the vehicle or any part thereof. Apparently, the vehicle was scrapped before Mr. Pruyn was retained by the Plaintiff. Therefore, at the trial the Plaintiff's expert, Mr. Pruyn, and the Defendant's experts, Mr. Conklin and Mr. Holcomb, were required to give their opinions as to the cause of the accident without having any opportunity to examine the vehicle or any part thereof.

According to the Plaintiff's evidence, the accident occurred as follows: The Plaintiff was coming from a party at a country club in the early hours of the morning (N.T. 333). The road was a narrow two-lane hard-top with a crown. The weather was foggy (Appendix 46a). There was a curve to the Plaintiff's left. Coming out of the curve, there was a fair downgrade (Appendix 51a). As the Plaintiff came out of said curve onto a straight stretch, he had difficulty keeping the vehicle on the road (Appendix 47a). Then after travelling about 600-700 feet (Appendix 51a) on the straight stretch, the vehicle went partially off the road onto the right berm and travelled with the right front and right rear wheels on the right berm for some distance. During this period, he was attempting to turn the vehicle to his left to get the vehicle back upon the road. After travelling for some distance with the right front and right rear wheels on the right berm, he did succeed in turning the vehicle to the left and re-entered upon the road, at which time the vehicle travelled to the Plaintiff's left in a rough diagonal direction across the road about 70-80 feet where it then proceeded off the road on the berm on the left-hand side (Appendix 49a, 50a). It then continued about 15-20 feet onto the left-hand berm and mounted or went over a

mound of dirt (N.T. 311) about 3 feet high, shearing off the top of said mound of dirt. It then continued a few more feet and ran into a gravel or shale pit where it turned over at least twice, finally coming to rest on its four wheels. The vehicle was totally demolished. The Plaintiff testified that, at the time he came out of said curve to the left, he was proceeding at about only 20-25 miles per hour (Appendix 46a) and that as he travelled down the straight stretch of road the 600-700 feet to a point where the vehicle went off the road on the right-hand side, he did not accelerate and that the vehicle was de-accelerating, and that when the vehicle re-entered upon the highway and began to cross the highway to the left, the vehicle was going about 15 miles per hour (Appendix 49a).

The issue of contributory negligence, as such, was not submitted to the jury. In fact, during the pre-trial conference (Appendix, pages 29a, 30a, 40a), as well as in the conference in chambers after the evidence was closed, the Defendant attempted to make it clear that the Defendant did not desire any charge on contributory negligence as such. Further, during said conference in chambers, the Court stated:

> "By the Court:
> I am not sending this case to the jury on the theory of contributory negligence." (Appendix, page 95a)

At no time during the charge did the Court mention contributory negligence. Further, during the course of the charge, the Court referred to driver error on only two occasions, as follows:

"Defendant contends that there was no defect in this automobile and that the accident was caused by driver error." (Appendix, page 101a)

"The defendant produced an expert who gave an opposite opinion, or gave a different opinion rather.

"He was of the opinion that the facts did not warrant the conclusion that the accident was caused by a defect, but rather it was caused by driver error and that this driver error was the proximate cause of the accident." (Appendix, page 106a)

As shown above, the Court merely mentioned that the Defendant contended the accident was caused by driver error and that the Defendant's expert stated an opinion that the accident was caused by driver error. This was the extent of the charge on driver error.

The Plaintiff did not request any charge on the burden of proof of contributory negligence and the Plaintiff did not take any objections to the charge, as required under Federal Civil Procedure Rule 51.

ARGUMENT

(1)

DRIVER ERROR WAS FOR THE JURY ON THE ISSUE OF CAUSATION

The issue of driver error was for the jury. The Plaintiff had the burden of proving that some defect in the right rear wheel of the vehicle caused said wheel to collapse which, in turn, caused the Plaintiff to lose control of the vehicle. The jury was not obliged to accept the Plaintiff's story. The physical facts of the accident, as established by the Plaintiff and the Plaintiff's own witnesses, actually discredited the Plaintiff's story. Therefore, the jury had the right to find the accident was not caused by a defect in or a collapse of said wheel but rather was caused by excessive speed or some other act of the Plaintiff, himself, in the operation of the vehicle or by the conditions under which the vehicle was being operated. Therefore, the issue of driver error had to be submitted to the jury in rebuttal of the Plaintiff's contention that the accident was caused by a defect in said wheel or on the issue of causation. Otherwise, the jury would be obliged to find that the accident was caused by a defect in the vehicle or by a collapse of said wheel.

The question of proximate cause is almost always for the jury. In *Dyson v. General Motors Corporation,* 298

F. Supp. 1064 (E.D. Pa. 1969), at page 1074, the Court stated:

> "As noted by the Pennsylvania Supreme Court in its most recent decision the question of proximate causation 'is almost always one of fact for the jury.' Bleman v. Gold, 431 Pa. at 354, 246 A. 2d at 380."

A recent statement of the Pennsylvania Supreme Court on this question is contained in *White v. Rosenberry,* 441 Pa. 34, where at page 40 the Court stated:

> "However, the question of what is the proximate cause of an accident is almost always one of fact for the jury. Bleman v. Gold, 431 Pa. 348, 246 A. 2d 376 (1968)."

We submit, therefore, the question of whether the proximate cause of the accident was a defect in said wheel or driver error was for the jury.

(2)

AT THE PRE-TRIAL CONFERENCE IT WAS UNDERSTOOD AND AGREED THAT DRIVER ERROR WOULD BE AN ISSUE AT THE TRIAL

At the pre-trial conference the Defendant stated that the Defendant would rely upon the Plaintiff's own story and the physical facts to show excessive speed and to prove that the Plaintiff himself caused the accident (Appendix 14a to 17a). There can be no doubt that the plaintiff understood that the Defendant intended to argue that the Plaintiff or driver error caused the accident because after the Court restated the Defendant's position and inquired

as to whether the Plaintiff understood the Defendant's statement, the Plaintiff answered "Right" (Appendix 17a). The Plaintiff then said he had decided to waive negligence and to proceed entirely on strict liability or under Section 402a of the *Restatement of Torts* and stated as a principle of law that contributory negligence was not a defense under Section 402a (Appendix 29a). The defendant agreed with this principle of law. However, the Defendant made it clear that it was still necessary for the Plaintiff to prove that the accident was caused by some defect in the vehicle; and therefore, the question of whether the Plaintiff himself caused the accident would still be an issue at the trial (Appendix 30a). In fact, at the end of the pre-trial conference the Defendant stated: "We will attempt to prove that the Plaintiff himself was the proximate cause of the accident, and the Plaintiff made no objection (Appendix 40a) and therefore agreed that driver error would be an issue at the trial.

That it was understood driver error would remain an issue is clearly shown by what happened at the trial. The Defendant called an expert, Mr. Conklin, and Plaintiff asked for an offer (Appendix 54a). The Defendant stated Mr. Conklin would testify that in his opinion the accident was caused by driver error (Appendix 55a & 56a). The Plaintiff made no objection. On the contrary, after completing his cross-examination of said witness on his qualifications, the Plaintiff stated: "If the Court please, I have no objections to proceeding with the direct testimony of the witness" (Appendix 57a). If it was not understood that driver error was an issue, certainly the Plaintiff would have objected to the Defendant's offer or to any opinion

by Mr. Conklin that the accident was caused by driver error. If driver error was not an issue, this was the stage at which Plaintiff should have objected. We also wish to point out that at the end of Mr. Conklin's testimony the Plaintiff did not move to strike his opinion that the accident was caused by driver error and made no objection whatsoever (Appendix 70a & N.T. 459). Further, after the evidence was closed and during a conference in Chambers, when the Plaintiff did move to strike the testimony of Mr. Conklin, the Plaintiff stated his reasons as follows:

> "By Mr. Monheit:
>
> My first motion is a motion to strike the testimony of Mr. Conklin on the ground that his opinion defies good common sense and is inconsistent at the core, and that as a matter of law, Your Honor should not allow the jury to consider it" (Appendix 77a).

At no time did the Plaintiff object to the testimony or the testimony or opinion of Mr. Conklin or any other witness on the ground that driver error was not an issue, and at no time did the Plaintiff move to strike the testimony or opinion of Mr. Conklin or any other witness on this ground.

The Plaintiff's written points for charge also show the Plaintiff understood and agreed that driver error was an issue in the case. Although the Plaintiff's written points for charge included at least ten requests for charge, no request that driver error should not be submitted to the jury was included among Plaintiff's written points for charge.

Argument

(3)

EVEN IF THE CHARGE WERE IMPROPER, A NEW TRIAL COULD NOT HAVE BEEN GRANTED BECAUSE PLAINTIFF FAILED TO COMPLY WITH RULE 51

Federal Civil Procedure Rule 51 provides as follows:

> *"Rule 51. Instructions to Jury: Objection.*
>
> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

The Plaintiff did not make the objection required under Rule 51. In fact, after the Court completed its charge and inquired, "Does counsel have anything?", the following discussion occurred between the Court and the Plaintiff (Appendix 111a & 112a):

"(Sidebar)

By Mr. Monheit:

I only have one charge that I am complaining about.

By the Court:

All right.

By Mr. Monheit:

That is there was no evidence in the record upon which the expert for General Motors, Mr. Conklin, could base his opinion that the plaintiff was traveling 35 miles an hour, that was speculative, wholly unsupported by the hypothetical question upon which his opinion was asked, and that to allow the jury to consider that fact itself since it goes to one of the key facts in the case highly prejudices the plaintiffs' case.

By the Court:

That is in line with the previous motions you made, isn't it?

By Mr. Monheit:

It is in line with the previous motions that I made, yes. My previous motions were more expansive.

By the Court:

Motion to strike and so forth. Is that all you have?

By Mr. Monheit:

Yes."

Therefore, the only complaint the Plaintiff made about the charge was a request that the Court charge the jury there was no evidence in the record upon which the Defendant's expert could base his assumption that the Plain-

tiff was traveling 35 miles an hour and that Mr. Conklin's opinion was speculative. The Plaintiff did not object to the charge on the ground that the issue of driver error should not be submitted to the jury. True, the Court inquired as to whether the Plaintiff's complaint was in line with previous motions made by the Plaintiff. However, it is clear that the Court was referring to the previous motions of the Plaintiff to strike the testimony of Mr. Conklin and the testimony of the Defendant's other expert, Mr. Holcomb (Appendix 77a & 80a) made during the conference in chambers after the close of the evidence, which motions the Court denied during said conference (Appendix 81a). Therefore, this inquiry of the Court was not sufficient to excuse the Plaintiff from making a proper objection under Rule 51. Under said Rule 51, the Plaintiff was expressly required to state distinctly the matter to which he objected and the grounds for his objection. Certainly, it cannot be said that the Plaintiff distinctly objected to the submission of the issue of driver error to the jury as required by Rule 51. We also wish to point out that, after the Defendant made certain objections to the charge, the Court again inquired of all counsel, "Is that it?", and the Plaintiff's attorney responded, "Yes" (Appendix 113a). Further, after the Court made an additional charge in accordance with a request of the Defendant, the Court again inquired, "Do you now have anything else?", and the Plaintiff made no response (Appendix 113a). Therefore, it cannot be argued that the Plaintiff made the objection required under said Rule 51.

The Third Circuit has repeatedly stressed the necessity for compliance with said Rule 51 and has refused to

review alleged error in the charge where the appellant failed to take an objection, as required under said Rule 51.

In *Harkins v. Ford Motor Company,* 437 F. 2d 276 (3rd Cir. 1970), at page 278, said Court stated:

> ". . . Fed. R. Civ. P. 51 makes it emphatically clear that '[N]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.' Counsel for the plaintiff did not so object to any portion of the instruction on strict liability. Fed. R. Civ. P. 51 is a salutary rule which contributes materially to effective trial administration. . . ."

In *Frankel v. Burke's Excavating, Inc.,* 397 F. 2d 167 (3rd Cir. 1968), said Court, at page 170, stated:

> "Plaintiffs raise many objections to the charge. However, counsel took no exceptions as required by F. R. Civ. P. 51. Consequently, they cannot be considered unless fundamental error is found."

In *Arnold v. Loose,* 352 F. 2d 959 (3rd Cir. 1965), said Court, at pages 963-964, stated:

> ". . . In addition, no objection was made to the judge's charge although there was full opportunity to do so. Failure by counsel to object to an instruction before the jury retires precludes counsel from assigning error to the instruction. Rule 51, Federal Rules of Civil Procedure."

Argument

In *Kolman v. Jacoby*, 419 F. 2d 395 (3rd Cir. 1969), said Court, at page 395, stated:

> "Appellants raise several complaints about the charge to the jury. A reading of the charge as a whole shows it to reflect accurately the legal standards governing this case. [Citing cases.] Moreover, no objection was made to one of these points relating to the burden of proof in damages as required under Fed. R. Civ. Proc. 51. Consequently, it cannot be considered on appeal absent our finding fundamental error."

We believe the comments of said Court in *Shaw v. Lauritzen*, 428 F. 2d 247 (3rd Cir. 1970), are significant. In this *Shaw* case, the third party plaintiff, Lauritzen, assigned as a ground for new trial the trial Court's granting of the third party defendant, Hogan's, Request No. 7. At the end of the charge, counsel for another party inquired, "I assume all counsel have an automatic exception to any party's points that were read?" and received an affirmative response from the trial judge. Apparently, in reliance upon this, Lauritzen did not object to the act of the Court in affirming said Request No. 7. In condemning the practice of granting automatic exceptions, said Court, at page 251, stated:

> "Also, in connection with Lauritzen's present objection to Hogan's Request No. 7, Lauritzen did not object to the reading of Request No. 7 before or after the charge was delivered . . . 'stating distinctly the matter to which he objects and the grounds of his objection'. . . but apparently relies on the affirma-

tive response of the trial judge at the end of the charge to this statement of counsel for another party . . . :

'I assume all counsel have an automatic exception to any party's points that were read?'

Particularly in a case such as this, where there were 48 Requests for Charge read to the jury and a 42-page charge . . . we affirm our statement in Trent v. Atlantic City Electric Co., 334 F. 2d 847, 858 n. 4 (3rd Cir. 1964): 'We take this opportunity to point out that the practice of granting automatic exceptions [to Request for Charge] * * * runs contra to both the letter and spirit of Rule 51 of the Federal Rules of Civil Procedure.' "

Wright and Miller Federal Practice and Procedure, Volume 9, at page 623, in discussing the purpose of Rule 51, states:

"The object of this rule is to afford the trial judge an opportunity upon second thought, and before it is too late, to correct any inadvertent or erroneous failure to charge. The rule also serves to lessen the potential burden of appellate courts by diminishing the number of rulings at the trial which they may be called upon to review."

Argument

(4)

CONCLUSION

In conclusion, we wish to mention the Court did not and could not charge on the burden of proof of contributory negligence for the reason that the issue of contributory negligence was not submitted to the jury. Further, the Plaintiff did not request any such charge and did not take any objection to the charge and failed to comply with Federal Civil Procedure Rule 51 as set forth above in this Brief.

While we realize Federal Civil Procedure Rule 19 does not set forth all the grounds for certiorari, we do wish to point out that no Federal question nor any important state or territorial question is involved nor is there any question of conflict of decisions with other courts of appeal. Further, it cannot be held there was such departure from the accepted and usual course of judicial proceedings as to call for an exercise of your Honorable Court's power of supervision.

We respectfully submit that the Petition for Certiorari should be dismissed.

Respectfully submitted,
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